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# Recent Legislation in Nigeria and Ghana Affecting Foreign Private Direct Investment†

## I. Introduction

Developing nations recognize the need for, and generally seek to attain, increased control over their respective economic destinies while, at the same time, not foreclosing the contributions from capitalist and socialist countries of foreign capital and technology so necessary for economic development. The lawyer involved in international commercial matters is well advised to keep abreast of different approaches to development adopted by those developing nations important to his practice.

Two West African nations, Ghana and Nigeria, have adopted, during the 1960's and early 1970's, approaches to economic development which sometimes coincide in policy and terms and sometimes differ in many respects, however, the approaches adopted by Ghana and Nigeria, the characteristics of their economies and foreign investments contribution to, or detraction from, their economies bear a resemblance to approaches and experiences applicable to many nations of the developing world. This article will attempt to describe briefly the Ghanaian and Nigerian economies, and to highlight Ghanaian and Nigerian fiscal, indigenization or nationalization, exchange control, and company measures enacted in the late 1960's and early 1970's which affect foreign private direct investment. These legislative measures are the operative basis upon which Nigeria and Ghana implement their development strategy.

## II. The Economies of Nigeria and Ghana

Ghana's and Nigeria's economies remain basically agricultural; that is,

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the agricultural sector provides the largest percentage of G.N.P. or G.D.P. and employs the largest percentage of the potential labor force.[1] Both nations depend upon agricultural products or mineral raw materials for the bulk of their foreign exchange earnings.[2] Similarly, both nations import a substantial percentage of manufactured goods utilized therein. Almost all capital and intermediate goods are imported, while much of their import substitutive industry relies heavily upon imported raw materials prior to "final touches" assembly.[3]

In essence, both Nigeria and Ghana demonstrate, to different but to decreasing degrees, the classic "colonial economy"—importing manufactures while exporting primary products. Both economies exhibit a low degree of inter-dependence between economic sectors.[4]

Ghana's and Nigeria's industrial sectors are concentrated in enclave-type extractive industries (bauxite, petroleum, gold, tin) or import-substitutive consumer goods industries,[5] being expatriate dominated.[6] Both types of industries exhibit weak linkage effects, with the exception of Nigeria's petroleum industry. Foreign private investment has increasingly

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[1]In 1967-68, agriculture provided 55 percent of Nigerian G.D.P. in Nigeria while employing 70-80 percent of the population. *Standard Bank, Nigeria,* ANNUAL ECONOMIC REVIEW, June, 1971, at 24. In Ghana, the agricultural sector, excluding cocoa, provided one-third of G.N.P. in 1969-70 while the percentage, including cocoa, probably would be 50 percent. The agricultural sector (including cocoa) in Ghana employs over 60 percent of the total labor force. *Standard Bank, Ghana,* ANNUAL ECONOMIC REVIEW, November 1970, at 16.

[2]*Generally, see* P. Robson and D. A. Lury (eds.) *The Economy of Ghana, The Economy of Nigeria,* THE ECONOMIES OF AFRICA (Allen and Unwin, 1969) at 123 and 190. For example, 18 percent of Ghana's total exports are mineral products (gold, bauxite, manganese) while petroleum comprised over 50 percent of Nigeria's total exports in 1970. *Standard Bank, Nigeria,* at 1.

[3]*Standard Bank, Ghana, supra* note 1, at 11; *Standard Bank, Nigeria supra* note 1, at 3, 7-8.

[4]For example, most rural capital goods are imported while agricultural products constitute a minute percentage of the raw materials' inputs into local industry, and intermediate goods are a small but increasing percentage of industrial output in either country. GERALD HELLEINER, PEASANT AGRICULTURE, GOVERNMENT AND ECONOMIC GROWTH IN NIGERIA (Princeton University Press, 1966), ch. 4-5; Robson & Lury, *The Economy of Ghana,* supra, note 2.

[5]About 56 percent of total value-added in manufacturing in Ghana is in consumer goods and construction, *Standard Bank, Ghana, supra* note 1, at 11. *See generally* W. Birmingham, P. Neustadt, E. N. Omaboe (eds.), A STUDY OF CONTEMPORARY GHANA: THE ECONOMY OF GHANA (Allen & Unwin, 1966), ch. 12.

[6]A Nigerian survey revealed that in 1964, over two-thirds of paid-up share capital in respondent companies employing ten or more people was of non-Nigerian private, investment. *See* P. KILBY, INDUSTRIALISATION IN AN OPEN ECONOMY: NIGERIA 1945-1966 (C.U.S. 1966) at 19-20. Little has occurred since 1964 to alter these figures except additional expatriate investment in petroleum and indigenous dislocation due to the civil war may have increased the expatriate ownership percentage. Similar observations concerning foreign domination of Ghana's industrial sector have been made, although precise figures seem unavailable. W. Birmingham, *supra* note 5, ch. 12.

concentrated in import-substitutive consumer goods and extractive industries, while a sharply declining proportion of such investment accures to the trading or distributive sector.[7] There is little expatriate participation in agricultural sector production.

Capital, technical and managerial requirements in Nigerian or Ghanaian extractive industries seemingly result in overwhelming expatriate control over such concerns.[8] However, the manufacturing sectors differ, with thousands of small-scale indigenous manufacturing concerns sharing the Ghanaian and Nigerian manufacturing industries with a few large, generally expatriate owned and/or managed businesses.[9] These large firms dominate any given industry in oligopolistic or near-monopolistic control, usually facing little competition from indigenous small-scale manufacturing concerns due to qualitative differences in outputs.[10] Medium-scale manufacturing concerns also are (or were) controlled by non-nationals such as Indians, Lebanese or Syrians.

Foreign private direct investment in Ghana and Nigeria, therefore, is divided generally between (i) larger, increasingly capital-intensive manufacturing and extractive enterprises with complex managerial or technical requirements and with economies of scale production requirements, which businesses usually are dominated by Western European or North American interests; and (ii) smaller medium-sized services, manufacturing, or trading enterprises requiring relatively little capital or technical know-how, more amenable to labor-intensive techniques, not requiring economies of scale production, which businesses often were owned by Indians, Syrians, or Lebanese.

The modern manufacturing sectors of both countries have demonstrated significant statistical growth since independence, primarily due to the small industrial base inherited from colonial times.[11] However, this modern sector remains a small percentage of G.D.P. in both nations.[12]

The industrial sectors, increasingly capital-intensive, are not creating

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[7]KILBY, *supra* note 6, at 66-67; Birmingham, *supra* note 5, ch. 12.

[8]Birmingham, *supra* note 5, ch. 11; *Standard Bank, Nigeria, supra* note 1, at 11-14; NIGERIAN HIGH COMMISSION IN U.K., WHY NIGERIA? (Gov't. Publication, 1970) at 21.

[9]KILBY, *supra* note 6, at 310; Birmingham, *supra* note 5, at 279.

[10]*Id.*

[11]For example, from 1957-1967, the manufacturing sector in Nigeria increased at an average annual rate of 60 percent while mining (oil) grew at an average annual rate of 90 percent, *Standard Bank, Nigeria, supra* note 1, at 24.

[12]Manufacturing accounted for about 10 percent of total domestic output by 1970 in Nigeria. *Standard Bank, Nigeria, supra* note 1, at 24. Similar figures for Ghana are unavailable although the manufacturing sector has been estimated at approximately 7-10 percent of G.D.P. by 1970 versus 2-3 percent in the late 1950's. The Nigerian Civil War, among other factors, limited expansion of the modern manufacturing sector; on the other hand, it saw a spurt of growth (outside Eastern Nigeria) in Nigerian import-substitutive industries.

employment commensurate with the growth of the urban labor force in these nations.[13] Unemployment and underemployment characterize both countries, creating numerous political and economic problems. Yet, while Ghana and Nigeria have a surplus of urban semi- or unskilled workers, both countries suffer from a dearth of skilled workers.[14] Also, lack of adequate supervisory personnel has hindered attempts to increase labor productivity.

Surplus urban unskilled labor is contrasted with labor scarcities in the Nigerian and Ghanaian agricultural sectors. Labor scarcities in some areas, rural investment bias toward export cash crops, primitive production techniques, higher producer prices for export crops, and over-all government investment bias toward the industrial sector, among other factors, have resulted in low domestic food crop productivity in both countries.[15] Ghana's agricultural sector does not feed the populace. Substantial food imports are necessary yearly; these imports exacerbate Ghana's balance-of-payments difficulties and divert foreign exchange from industrial sector investment.[16] Inadequate food in Ghana caused food price inflation throughout the 1960's which, in turn, reduced purchasing power from manufactured items and has restricted market development. Nigeria's agricultural sector, on the other hand, largely has met demand for basic foodstuffs, although a poor harvest in 1971 caused shortages of staple foods. It fails, however, to meet demand structure changes toward higher protein foods; thus, usually about ten percent of yearly Nigerian imports are foodstuffs.[17]

Balance-of-payment deficits, either on visible or invisible accounts, have plagued Ghana and Nigeria since the late 1950's.[18] These deficits, arising from declining world market prices for their primary products, coupled with the drawing down of exchange reserves for development programs (often invested in non-directly productive infrastructural projects or squan-

[13]KILBY, *supra* note 6, ch. 7; C. S. Franks, *Industrialization and Employment Generation in Nigeria*, NIGERIAN JOURNAL OF ECONOMIC AND SOCIAL STUDIES, vol. 9, no. 3, November 1967, at 277; Birmingham, *supra* note 5, ch. 1, and vol. II, ch. IV, *Population Prospects and Policy*.

[14]KILBY, *supra* note 6, chs. 7, 8; Birmingham, *supra* note 5, ch. 6.

[15]Ferdinand Stoces, *Agricultural Production in Ghana, 1955-1965*: ECONOMIC BULLETIN (GHANA) vol. 10, no. 3 1966 at 29; J. C. Wells, NIGERIAN J. ECON. SOCIAL STUDIES, vol. 9 at 270. Helleiner 4, ch. 3, 5; *Standard Bank, Ghana, supra* note 1, at 8.

[16]Stoces, *supra* note 15, at 3; *Standard Bank, Ghana, supra* note 1 at 4.

[17]Carl K. Eicher, Carl Liedholm (eds.), GROWTH AND DEVELOPMENT OF THE NIGERIAN ECONOMY (Mich. State Univ. Press, 1970), at 379 *et seq.*

[18]Birmingham, *supra* note 5, ch. 1; Helleiner, *supra* note 4, at ch. 2. Ghana recently devalued the Ced by 24% easing the balance of payments situation. Nigeria revalued its pound in relation to the dollar from $2.80 to $3.04.

dered through corruption) forced exchange control restrictions in both nations. The restrictions have discouraged new foreign investment in Ghana and, but for petroleum and Nigeria's market size, might have done the same in Nigeria. Ghana is presently largely dependent upon foreign public or private financial assistance for further economic development. Oil revenues, however, have allowed the Nigerian Federal Government to match revenues with outlays in 1971, for the first time in many years.

Nigeria's large, heterogeneous population offering prospects of significant local demand should allow development of some intermediate and capital goods industries dependent upon economies of scale. Market size considerations reportedly have prompted some foreign private investment in Nigeria; however, low G.D.P. per capita presently limits real market size, and often forces under-utilized industrial capacity.[19]

Ghana's population, being much smaller than Nigeria's, cannot single-handedly support much intermediate and capital goods industry. G.D.P. per capita is higher than in Nigeria though it may be increasing at a slower rate.[20] Both nations have (i) a high population growth rate creating a high dependency ratio, and (ii) a large percentage of the work force in low income employment.[21] Both factors limit market size by limiting possible consumption. Yet both nations have experienced market growth and changing demand structure due to rising incomes which has spurred establishment of import substitutive industries.[22]

The benefits and detriments of foreign private investment in developing economies such as Nigeria's and Ghana's, as described above, are well discussed elsewhere.[23] Suffice it to say that foreign private investment places the recipient developing country in a dilemma: the country either allows or encourages growth of foreign capital, in which case it is faced with increasing foreign control of its capital stock, or it limits this growth to lessen remittances and foreign control, yet by doing so, may reduce foreign investments advantages. A balanced approach is required and is attempted in somewhat different manners by Ghana and Nigeria, as is examined below.

[19]KILBY, *supra* note 6, ch. 3; Oral information, Dr. W. M. Warren, S.O.A.S. University of London, 1970 - 1971 session.

[20]*Standard Bank, Ghana, supra* note 1, at 16. The real annual economic growth rate in Ghana from 1966 - 1970 averaged 1.5 percent.

[21]G. K. Agama, *Population and Manpower Development in Ghana*, NIGERIAN J. ECON. SOCIAL STUDIES, vol. 11, No. 3, 1969, at 285; Robson and Lury, *The Economy of Nigeria*, *supra* note 2, at 190.

[22]Birmingham, *supra* note 5, ch. 1, 5, 12; KILBY, *supra* note 6, ch., at 63 - 64.

[23]*See, for example*, GERALD M. MEIER, LEADING ISSUES IN DEVELOPMENT ECONOMIES (O.U.P. 1964), at 149 - 169.

## III. Recent Legislation in Ghana and Nigeria

### *A. Indigenization and Nationalization*

Recent Ghanaian and Nigerian measures have in part restricted and in part promoted foreign private direct investment. These measures, overall, perhaps demonstrate a more realistic attitude toward such investment. Both the Ghanaian and Nigerian governments seem to recognize increasingly the limitations and pitfalls of over-reliance on foreign private investment, thus each government seeks progressive indigenization of its respective economies while garnering increasing governmental influence over expatriate enterprises.

Both nations recently initiated or announced measures aimed at excluding non-nationals from those enterprises not requiring significant capital, technical, or managerial inputs. The Ghanaian Business (Promotion) Act, 1970,[24] affects non-African businessmen, mainly Lebanese, Syrian, or Indian medium-scale entrepreneurs in the commercial, transport, and other enterprises. In essence, this Act (unless any person or enterprise is exempted under § 31 from the Act's operation): (i) forcibly transfers small and medium-scale retail and wholesale trade to Ghanaians, while forbidding prospective establishment of alien retail or wholesale trading enterprises or expansion of existing ones without government permission, and (ii) reserves a hodge-podge of other labor-intensive, simple-technology enterprises to Ghanaians.[25]

The Minister of Finance estimated the Act would affect about six hundred alien businesses (mainly Lebanese, Syrian and Indian) with a total capital investment approximating ₵15 million and with at least four thousand employees. By early 1971, the majority of alien-owned stores subject to the Act's August 1970 deadline had been taken over by Ghanaians but for larger, mostly wholesale, businesses.[26]

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[24]Act 334 (1970).

[25]Enterprises solely reserved to Ghanaians as of August 1, 1970 included businesses operating as sole sales or promotional agents for overseas principals, taxi service, sale under a lease-purchase contract of taxis or vehicles intended to be used in the operation of a taxi service. § 12. Enterprises solely reserved to Ghanaians as of June, 1971 include commercial transportation by land, baking, printing (other than textile printing), beauty culture, produce brokerage, advertising and publicity, and manufacture of cement blocks for sale. § 13. Likewise, aliens are forbidden to be engaged in petty trading.

[26]STANDARD BANK REVIEW, January 1971, at 14. Greater difficulties were experienced implementing the July 1, 1971 deadline for transferring non-trading company concerns affected by the Act. Mr. Mensah, Ghanaian Finance Minister, warned in early July that a number of firms in these fields had made no efforts to sell their businesses or had waited until the last possible moment before selling. WEST AFRICA, week ending 9th July 1971.
The Business (Promotion) Act evidently has caused considerable increase in the formation of

The Act is a slightly, but significantly, modified version of the Ghanaian Enterprises Decree, 1968.[27] Firstly, the 1968 Decree reserved to Ghanaians wholesale trade enterprises with a turnover of ₵1 million or less, while retail trade enterprises with a turnover of ₵500,000 or less, were likewise reserved. The 1970 Act, in § 11, reduces the cut-off point for wholesale trade to ₵500,000, thus supposedly (although perhaps not actually) reserving a larger segment of wholesale trade. The large Ghanaian trading enterprises such as UAC or John Holt, however, are not affected by the Act's exclusionary provisions.

Secondly, aliens operating a reserved enterprise at the time of the 1968 Decree were granted five years in which to operate and liquidate their businesses, whereas the 1970 Act allows no such "breather space" and, in effect, "Ghanaianizes" affected enterprises two to three years before the 1968 Decree.

Thirdly, the 1968 Decree reserved to Ghanaians all enterprises employing thirty or fewer people which "requires simple production or operational techniques or any enterprise with a capital of one hundred thousand new cedis or less" in extractive, processing, transportation, or manufacturing industries.

The 1970 Act, in §13, greatly narrows the purview of this reservation by removing general references to employee numbers, technology, and industries concerned, and by specifically enumerating affected enterprises within the broader categories of manufacturing and processing. The Finance Minister explained this narrowing of the ambit of the 1970 Act as an attempt to avoid confusion among foreign investors as to which industries involved simple technology and were thus reserved. A more likely reason might have been Ghanaian entrepreneurs' poor response to fill the potential vacuum created by the 1968 Decree among affected enterprises.[28]

The limitation in the 1970 Act of Ghanaianization to petty trading, to small and medium-scale commercial enterprises, and to specifically enumerated manufacturing or service enterprises manifests the Government's pragmatic approach toward foreign private enterprise and development of a Ghanaian entrepreneurial class: Aliens are to be progressively excluded, first in those areas demanding little capital and simple technical or manage-

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indigenous Ghanaian business entities. For example, between January and December 1970, 1820 new Ghanaian companies were registered, and since the Act came into force in August 1970, the rate of registration has doubled. WEST AFRICA, week ending 9th July 1971.

[27]N.L.C.D. 323 (1968).

[28]Another reason might well have been inadequate government financing arrangements for indigenous Ghanaian businessmen under the 1968 scheme. Inadequate credit facilities would have limited opportunities for Ghanaians to take over alien enterprises.

rial skills while, at the same time, hopefully not jeopardizing establishment of capital-intensive, complex technology industries by frightening off large foreign concerns; that is, one "indigenizes" according to what the Government believes indigenous elements may manage successfully at that time.

Nigeria, in its Second Development Plan 1970 – 74, announced that it would establish a strict "Nigerianization" time-table and intended to indigenize completely the domestic distributive trade sector by (i) establishing large indigenous co-operatives, and (ii) providing facilities designed to divert operations increasingly to Nigerians.[29] The Government promised to deny expatriate visas for general distributive trades, wholesale or retail. Thus, Nigeria apparently intends to go one step beyond Ghana and exclude aliens from large-scale trading enterprises, thereby affecting UAC, John Holt, A. G. Leventis and others. Moreover, in early 1972, the Supreme Military Council decreed (i) a list of 22 categories of businesses to be reserved for indigenous businessmen,[30] and (ii) a list of other categories of businesses to be reserved to Nigerians if the business has a fixed capital of less than £N200,000 and less than 40 percent indigenous equity participation.[31] As in Ghana, businesses to be wholly reserved to Nigerians are services or simple technology, minimal capital manufacturing, or processing enterprises. The Nigerian measure, however, does theoretically encompass more enterprise categories than does the Business (Promotion) Act.

Expatriates perhaps most affected by this prospective legislation, as in Ghana, will be non-Nigerian Africans and Mediterranean area businessmen, rather than Western European or North American concerns already established in Nigeria or contemplating establishment. The Nigerian mea-

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[29]NIGERIAN NATIONAL PLAN, *supra* note 12, at 230.

[30]Including retail trade, bread and cake making, rice milling, tire retreading, candle making, singlet manufacturing, hairdressing, laundry and dry-cleaning, ordinary garment manufacturing unconnected with the textile production, road haulage, municipal bus services, shipping, clearing and forwarding agencies, travel agencies, lotteries, printing, assembly of radio and television sets, etc., not combined with the manufacture of components, newspaper publishing and printing, radio and television broadcasting, advertising agencies and public relations, block, brick and ordinary tile manufacture, jewellery making, cinemas and other places of entertainment, casinos and gaming centers. WEST AFRICA, week ending 17 March, 1972.

[31]Brewing, slaughtering, meat storage, distribution and processing, fish and shrimp trawling and processing, cosmetics manufacture, insecticides, pesticides, fungicides, soap and detergent manufacture, screen printing on cloth, dyeing, suitcase and briefcase, textile and leather goods, manufacturing, paper conversion industries, distribution agencies for machinery and technical equipment, distribution and servicing of vehicles, internal air transport, coastal and inland waterways, shipping, construction, cement, paint manufacture, production of sawn timber, plywood and other wood conversion industries, manufacturing of bicycles and wire, nails and washers, etc., furniture making, including cushions and mattresses. *Id.*

sure seemingly intends to allow continued foreign private direct investment in capital-intensive, intermediate, or capital goods industries. A progressive indigenization policy similar to Ghana's evidently is envisaged.

Implementation of indigenization policies involve mandatory training programs for Ghanaians or Nigerians which in turn affect expatriate enterprises. For example, a company in Ghana may take advantage of the 1963 Capital Investment Act's[32] numerous fiscal incentives as an "approved project" only if it establishes administrative and technical training programs for Ghanaians,[33] while the 1970 Business (Promotion) Act stipulates in Section 16(1) "every alien who operates *any* enterprise shall institute a training scheme for Ghanaians . . . (emphasis added). The value of these mandatory training schemes turns upon the vigor with which the respective governments implement them; both Ghana and Nigeria reputedly have been lax in this matter. The Nigerian 1970–74 Plan, however, promised establishment of an "enforcement agency" to work with the Expatriate Quota Committee to assure timely implementation of Nigerianization through fiat or training scheme.[34] No such agency apparently exists in Ghana although a plethora of advisory committees performs a quasi-supervisory function.

Ghana and Nigeria apparently pursue divergent policies concerning compulsory government participation in industrial enterprises. Nigeria announced its intention to require at least 55 percent government equity ownership in "(i) Iron and steel basic complex, (ii) Petro-Chemical industries, (iii) Fertilizer production, (iv) Petroleum products (especially for local distribution."[35] Likewise the Nigerian Development Plan forecast that certain industries would require at least 35 percent private indigenous participation and government equity participation. The Plan mentioned as a partial list of such industries, "(i) Plantation production of traditional cash-crops and of basic raw materials for processing industry, such as wheat and sugar, (ii) Food industries, (iii) Forest product industries, (iv) Building materials and construction industries."[36] Moreover, Nigeria recently decreed establishment of a Nigerian National Oil Corporation,[37] empowered, among other functions, to explore, acquire, process, and mar-

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[32]Act 172 (1963).

[33]§ 6(a).

[34]NATIONAL PLAN, *supra* note 12, at 286–87. So also, Nigeria, in October, 1971 created an Industrial Training Fund to be financed primarily by required contributions from private firms.

[35]NIGERIAN NATIONAL PLAN, *supra* note 12, at 145.

[36]*Id.*

[37]Nigerian National Oil Corporation Decree 1971 (No. 18).

ket petroleum and its by-products (natural gas).[38] Presumably, this public corporation's appearance will be the initial step in eventually establishing Nigerian control over petroleum and its by-products.

Ghana, on the other hand, now largely refrains from establishing public entities or demanding mandatory government equity participation in specified industries, in contrast to Nigeria's progressive nationalization.[39]

Thus, while both Ghana and Nigeria seek progressive indigenization (mandatory sales to private interests), only Nigeria apparently seeks progressive nationalization (mandatory government participation). Nigeria announced in the 1970-74 Development Plan, however, that where nationalization did occur, compensation would be made in accordance with "internationally accepted norms of equity and fair play."[40] It, as has Ghana, earlier translated this promise into more concrete terms by decreeing Nigeria's acceptance of investment disputes arbitration under the auspices of the International Centre for Settlement of Investment Disputes.[41]

### B. Fiscal Measures

Nigeria and Ghana have broadly similar corporate tax legislation. The Nigerian Companies Income Tax Act, 1961 [C.I.T.A. 1961] and the Ghanaian Income Tax Decree, 1966 [I.T.D. 1966][42] adopt similar criteria regarding ascertainment and assessment of corporate tax. Both Acts tax only income accruing in, derived from, brought into, or received in the respective country;[43] this is defined or treated in such a way that no tax is imposed on world-wide earnings unless brought into the country.

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[38] *Id.* § 2.

[39] The National Liberation Council sought to sell off public corporations, albeit somewhat unsuccessfully, and did not demand mandatory government equity participation in new "crucial" sector industries; the Ghanaian Progress Party follows a similar policy. The reason for this restraint may be in Ghana's precarious international financial positions due to heavy foreign debts and debt securing obligations and resulting reliance upon debt reschedulings from its main sources of foreign investment (U.K., West Germany).

[40] NIGERIAN NATIONAL PLAN, *supra* note 12 at 288.

[41] International Centre for Settlement of Investment Disputes (Enforcement of Awards) Decree 1967 (No. 49).

[42] Companies Income Tax Act, 1961 (Act No. 22): Income Tax Decree 1966 N.L.C.D. 78. The I.T.D. 1966 and C.I.T.A. 1961 provisions, as amended, relating to charge to tax, assessment of the profits of trade, deductible expenses, losses and capital allowances in relation to companies, apply, for all intents and purposes, to unincorporated business as well; for example, I.T.D. 1966 encompasses both incorporated and unincorporated business entities within its purview, whereas the C.I.T.A. provisions concerning these matters are similar to those in the Income Tax Management Act 1961, which applies to unincorporated business entities.

[43] C.I.T.A. 1961, § 17; I.T.D. 1966, §§ 5 and 7(3).

1. Deductions

Both Acts allow, in ascertaining taxable income, broadly similar deductions or disallow similar expenses. The Ghanaian Income Tax Decree allows deductions for (i) interest paid, (ii) commercial rents, (iii) any expense incurred for repair of premises, plant, machinery, or fixtures or any expense incurred to renew such items, (iv) bad debts, and (v) the catch-all provision, "expenses wholly and exclusively incurred . . . in the production of the income."[44] Nigeria allows the same deductions,[45] while requiring that deductible expenses be "wholly, exclusively, and *necessarily* for the purpose of the production of any profits" (emphasis added).[46]

Both Acts disallow as deductions,[47] (i) capital expenditures, (ii) depreciation or "any" (Nigeria) or any "fixed" (Ghana) assets, and (iii) foreign taxes except where double taxation relief is given.[48]

2. Capital Allowances

Capital allowances are allowed on "qualifying expenditures" under both the Ghanaian and Nigerian legislation.[49] These allowances, in effect statutory depreciation, are granted in respect of a "basis period" (normally the year of expenditure), but are allowed against current tax assessment. Initial and annual allowances are provided; that is, a certain initial percentage of qualifying expenditure is deductible in the first year of the asset's use, whereas annual allowances are granted for that same year and for future years during the assets use-life as a percentage of the declining balance of expenditure.[50] Capital allowances equal the net cost of the asset, spread over its life.[51]

[44]I.T.D. 1966, § 8.

[45]C.I.T.A. 1961, § 31. For bad debts, *see* C.I.T.A. § 27(d).

[46]C.I.T.A. 1961, § 31.

[47]C.I.T.A. 1961, § 28; I.T.D. 1966, § 9.

[48]I.T.D., §§ 26-28. Nigeria provides tax credit relief for incomes liable to both foreign tax and Nigerian income tax under two general forms (1) relief in respect of Commonwealth income tax, and (2) relief under double taxation agreements. The first form of relief is given by setting off tax already paid in the Commonwealth country concerned against the tax due in Nigeria. The following conditions must be met: (a) relief is available only to Nigerian residents, (b) relief is given only where the other country concerned has passed reciprocal legislation in respect of Nigerian income, and (c) relief if limited to half the Nigerian tax rate applicable.

[49]Definition of a qualifying expenditure, *see* I.T.D. 1966, Third Schedule, § 1. For example, capital expenditures on plant, machinery, fixtures, permanent buildings, mining, or other extractive expenditures are "qualifying expenditures."

[50] Initial Allowances (per centum)

| | *Nigeria* | *Ghana* |
|---|---|---|
| Plant | 20 | – |
| Mines | 20 | 20 |
| Industrial Buildings | 15 | 20 |
| Plantations | 25 | 10 |

3. Corporate Tax Rates and Excess Profits Taxes

Nigeria corporate tax rates differ between Ghana and Nigeria. Nigeria's C.I.T.A. 1961, s. 32, as a general rule, imposes a 40 percent income tax on corporate profits. Some companies, however, such as pioneer or small companies, enjoy certain tax relief. A super (excess profits) tax is assessable on all companies, unless specifically excepted. The Super Tax (Amendment) Decree 1970 (No. 12) levies a tax surcharge on profits in excess of the standard deduction. Standard deduction is defined: (i) for Nigerian companies,[52] as the greater of the £N5000 or 15 percent of paid-up share capital, and (ii) for non-Nigerian companies, as the greater of £N5000 or 25 percent of profits derived from that year's Nigerian operations. The 1970 Amendment provides for tax surcharge, on profits in excess of the standard deduction, of (i) 10 percent of the first £N5000 in excess of the standard deduction, (ii) 15 percent on the next £N5000, and (iii) 25 percent over £N10,000. The Super Tax (Amendment) (No. 2) Decree 1971 (No. 12), in turn, limits the above super-tax rates to 10 percent as follows:

Firstly, if a company's profits exceed £N10,000 and within one year thereafter, it capitalizes those profits by increasing paid-up share capital by at least 50 percent of the profit earned (i.e., at least £N5000), then that

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Note: The initial allowance in Ghana may be altered by operation of the Capital Investments Act, 1963 (Act 172).

Annual allowances vary in each country and are subject to some discretion among appropriate authorities, *see* I.T.D. 1966, Third Schedule, § 6, and Nigeria Companies Income Tax (Amendment), Decree 1971 (No. 10). The Ghanaian Decree in Third Schedule, § 6(5) allows the Inland Revenue authority to grant an extra 10 percent annual allowance when a business establishes a sinking fund to replace equipment.

[51]The Ghanaian Income Tax (Amendment) Decree 1968 (N.L.C.D. 265) amends the Income Tax Decree 1966, Third Schedule concerning capital allowances to provide an additional capital allowance incentive to industrial reinvestment.

"Where the Commissioner is satisfied that any industrial establishment has in its basic period incurred any capital expenditure in the acquisition of any plant or machinery wholly and exclusively for the purposes of the industry carried on by such establishment, the Commissioner *shall*, in addition to any other allowance granted under the Schedule, grant to such establishment an investment allowance equal to 5 per centum of the expenditure so incurred" (emphasis added).

An industrial establishment is defined to include any establishment engaged in mining, manufacturing, building, vehicle assembly, oil refinery, agriculture.

The Nigerian 1970-74 Plan forecasted a change in government policy concerning capital allowances. Rather than following the prior practice of granting capital allowances on an industry-wide basis, it was declared that such allowances would henceforth be "imposed so as to discriminate among industries; and within each individual industry, between different activities," at 286.

[52]A "Nigerian" company is defined in § 2 of the 1961 Companies Income Tax Act (No. 22), as "any company the control and management of whose activities are exercised in Nigeria."

company pays the reduced rate for that year and for every subsequent year in which its paid-up share capital remains at the new level.

Secondly, if a company's paid-up share capital is at least £N75,000 and this amount is paid up in "foreign funds" (non-Nigerian monies, not necessarily sterling or dollars), then the company is entitled to the reduced super-tax rate for that year and for every subsequent year that paid-up capital remains at £N75,000. The 1971 Amendment assuredly is meant to foster retention of profits in Nigeria through capitalizations.

Ghana's company tax rates have been altered often since promulgation of the 1966 Decree. The Taxation (Amendment) (No. 2) Act 1970[53] amends the 1966 Decree's Fifth Schedule pertinent to foreign investors: (i) companies licensed under the Excise Ordinance 1953,[54] other than exceptions concerning companies wholly-owned by Ghanaians, pay 50 percent tax on taxable income, and (ii) companies not so licensed pay a 55 percent company tax. The 1970 Taxation Amendment abolished the previous corporate tax rate differentiation between chargeable income retained in Ghana versus that remitted abroad.

Accordingly, Ghanaian company tax rates on taxable income earned in Ghana are the same whether that income remains in Ghana or is remitted. This is similar to Nigeria's position. One may question the value of abolishing the remittance withholding tax for Ghana's, not foreign private investors', purposes. The 1971 Income Tax Regulations, however, somewhat mitigate the effects of this abolition.[55]

Like Nigeria, Ghana imposes a tax surcharge upon company or partnership taxable income via the Excess Profits Tax Act, 1963;[56] as amended,[57]

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[53]Act 344 (1970).

[54]Act 31 (1953).

[55]Income Tax Regulations, 1971 L.I. 684:

1. "Profits, dividends or similar distributions, remitted out of Ghana during any year of assessment shall be deemed to be made out of chargeable income for that year of assessment [*i.e.*, taxable].

2. "The amount of profits, dividends or similar distributions remitted shall be the amoumt so distributed up at the rate applicable to the year of assessment in regulation 2.

3. "Where the total amount of profits, dividends or similar distributions remitted during any year of assessment equals or exceeds the chargeable income for such year of assessment, the whole of the chargeable income for such year shall be deemed to be not retained in Ghana. [*i.e.*, subject to higher tax rates].

4. "Where the total amount of profits, dividends or similar distributions remitted during any year of assessment exceeds the chargeable income of such year of assessment, the excess shall be deemed to form part of the chargeable income not retained in Ghana for any previous year of assessment so, however, that the amount of such profits, dividends or similar distributions deemed not retained in Ghana shall not exceed the chargeable income for such previous year. [*N.B.* Does this limit how much can be remitted abroad in any year to the amount of previous year's chargeable income?] and the tax on such excess shall be calculated at the rate applicable to the previous year . . ." (emphasis added).

[56]Act 211 (1963).

[57]Excess Profits Tax Act, 1963 (Amendment) Decree, 1967 N.L.C.D. 195.

this Act levies a 10 percent surcharge on taxable income in excess of the "standard deduction."[58] The Excess Profits Tax (Amendment) Decree 1969 (N.L.C.D.) 376, amends the 1963 Act to allow the Finance Minister, in his discretion, to exempt from surcharge any company or partnership engaged in manufacturing, subject to some minor exclusions. This amendment is an attempt to augment the incentives to establishing manufacturing enterprises in Ghana.

4. Minimum Taxable Income

The Ghanaian Income Tax Decree 1966, in section 20(3) (4), stipulates a minimum taxable income regardless of a company's actual profit situation for the year. Section 20(3) defines chargeable income as total income less capital allowances, and:

> . . . in any case the minimum chargeable income shall include an amount of not less than two and a half per centum of its turnover irrespective of the actual profits of the business, unless the business of such company is a mining, timber or manufacturing business which is in its first five years of assessment.[59]

Thus, even when a company has a loss in any one year, it is subject to a 2 1/2 per cent turnover tax. Nigeria provides for "fair and reasonable percentage taxation" if no profits are earned in a particular year.[60]

Both nations provide for company income tax assessment when income is not readily ascertainable. Section 31 of the I.T.D. 1966 stipulates that a non-resident "person" (includes corporate and non-corporate business entities) doing business in Ghana shall be taxed through his or its agent in

[58]Standard deduction is defined in section 12 as: "(a) company: 10% of such company's paid up share cpaital on the 1st day of the company's accounting period which forms the basis of assessment or an amount equaling the average of the chargeable income of that company for the 3 assessment years prior to the one in question, *whichever* is *greater*. [As for associated or subsidiary companies the Minister can decide the amount of the capital, *i.e.*, whether parents' capital should be included]. (b) partnership: whichever is greater, 10% of the aggregate of the capital, on the 1st day of the partnership's accounting period which forms the basis of assessment for such year, contributed by partners to the partnership or the average of the aggregate chargeable incomes of the partners from a partnership day the 3 previous years assessment periods.
Provided that (1) where a company starts business, the standard deduction is for the first three years, 10% of the paid up share capital on the day trade commences or £5000 whichever is greater"; (2) where a partnership starts up, for the first 3 years, the standard deduction is £5000 or 10% of the aggregate of capital contributed by all the partners on the date the partnership commenced.
Excess profits will not be levied (1) where the companies chargeable income is under £5000 or a partnership chargeable income is under £7500 nor (2) where chargeable income of a company or partnership does not exceed the minimum chargeable income specified in section 21 of the Ordinance for such company or partnership or (3) where the company's exempted under the 1963 Capital Investment Act.

[59]I.T.D. 1966, § 20(3).

[60]Income Tax (Amendment) Decree 1968 (No. 58), amending C.I.T.A. § 30.

Ghana. It allows for tax assessment: (i) when a non-resident person carries on business with a person resident in Ghana controlled so that "no profits or less than the ordinary profits which might be expected to arise from that business" are produced, then the non-resident shall be taxed on the missing income as if the resident were its agents, and (ii) "where it appears to the Commissioner . . . or to the Court or Board of Appeal" that the true amount of any non-resident's chargeable income in a resident person's name cannot be "readily ascertained," the Commissioner, Court or Board may assess the non-resident a company income tax "on a fair and reasonable percentage of the turnover of the business done by the non-resident through or with the resident."[61]

The Nigerian Income Tax (Amendment) Decree 1968 (No. 58) amends C.I.T.A. section 30 to allow the Inland Revenue to assess income on a "fair and reasonable percentage" of the turnover of a corporation operating in Nigeria if, for any year, the business either produces assessable income less than the amount the Inland Revenue might expect such a business to generate, assuming the actual amount cannot be readily ascertained. Assumedly, these provisions help protect the Governments from multinational corporations shifting earnings between different overseas entities and thus understating income earned by Nigerian subsidiaries.

Neither Ghana nor Nigeria treats stock dividends as income to the recipient,[62] thereby seeking to encourage retaining earnings in Nigeria or Ghana in capitalized form for reinvestment.

6. Capital Gains Tax

The 1967-68 Ghanaian Budget statement proposed abolition of Ghana's capital gains tax; that same year, Nigeria decreed The Capital Gains Tax Decree 1967 (No. 44).[63] The Nigerian capital gains tax is 20 percent; non-reinvestment business assets are taxed while the reinvested proceeds from the sale of business assets are exempted.[64] It is unclear whether gains from sales of non-government Nigerian securities are subject to the capital gains tax. Capital losses are deductible through rather obtuse means.[65]

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[61]L.T.D. 1966, §§ 31(2) and (3).

[62]The Finance (Miscellaneous Taxation) Decree 1967 (No. 47) amends § 22 of the C.I.T.A. 1961 and I.M.T.A. 1961 § 9(1) to provide for this in Nigeria.

[63]Capital Gains Tax Decree 1967, § 46(3). This decree applies throughout the Federation for company taxation but applies only to the Federal Territory as concerns personal taxation unless extended by edict.

[64]*Id.*, § 32.

[65]*See, generally*, § 5.

7. Fiscal Incentive Legislation

Nigerian legislation including foreign private investment incentives has been carefully examined by various authors,[66] and this article will not duplicate such efforts. Recent developments, however, deserve mention. The Industrial Development (Import Duties Relief) Decree 1971 (No. 22) repealed and re-enacted its 1958 predecessor in significantly amended form. Firstly, the 1971 Decree in section 1 empowers the Federal Executive Council (F.E.C.), in certain cases, to publish a list of tax-exempt "pioneer" industries and products. Pioneer status ostensibly is to be granted on a value-added potential or product basis rather than the former practice of industry-wide pioneer status.[67] Secondly, application for a pioneer certificate may be made only if the qualifying capital expenditure cost incurred by the company, on or before beginning production, is not less than £N25,000 for an "indigenous-controlled company" and £N75,000 for any other company.[68] In contrast, the 1958 Act provided for tax relief to any company permitted pioneer status regardless of capital expenditure for the initial two-year relief period, and allowed up to three additional years tax relief for additional capital expenditure from £N15,000 (1 year), £N50,000 (2 years), and £N100,000 (3 years).[69]

Thirdly, the initial tax relief period is now three years (versus two under the old Act) at the end of which period tax relief may be extended for (a) one year, and thereafter for another year, or (b) for one single period of two years. However, this additional period turns on the F.E.C.'s discretion; that is, there is no additional tax relief unless the F.E.C. is satisfied as to (i) the state of expansion, efficiency, and level of company development, (ii) the implementation of "any scheme to train Nigerians or use Nigerian raw materials," (iii) the relative importance of the industry to the economy, (iv) the need for the extension, (v) other relevant matters."[70] These criteria represent a change from the quantitative criteria of the 1958 Act (amount of investment) to a qualitative criteria under the 1971 Decree.

Finally, the 1971 Decree seemingly alters loss carryover potentialities.

[66]*See, generally*, SAMUEL SUCKOW, NIGERIAN LAW AND FOREIGN ENTERPRISE IN NIGERIA (O.U.P. 1965); and DAVID R. MUMMERY, THE PROTECTION OF INTERNATIONAL PRIVATE INVESTMENT: NIGERIA AND THE WORLD COMMUNITY (Praeger, 1968).

[67]The Nigerian 1970-74 Plan stated that during the Plan period, pioneer status gradually would be replaced by a system allotting such status on a specific industrial basis, dependent upon the value-added potential of the proposed industry.

[68]*Id.*, § 1. An indigenous controlled company is a company whose equity capital and all other classes of shares conferring voting rights are vested in native-born Nigerian citizens and these persons must control the board of directors.

[69]*Id.*, § 11.

[70]*Id.*, § 10.

Whereas under the prior Act a loss in any *one* year of the tax relief period could be carried over[71] to the post relief period, the 1971 Decree allows for loss carryover only to the extent of any *net* loss for the entire relief period.

Ghana's Capital Investments Act 1963 remains in force, seemingly unamended. This Act, designed to promote foreign investment, extends fiscal incentives to "approved projects,"[72] including 1 - 10 year income tax holidays with capital depreciation (allowances) deferred until after the holiday,[73] and exemptions from import and customs duties or from purchase tax assessments where the business is export oriented or import-substituting.[74]

Another recent Ghanaian fiscal incentive measure is the Foreign Exchange (Export Bonus) Act 1971[75] which provides certain exporters with a rebate on their appropriate foreign exchange earnings. A certain percentage of the exporter's foreign exchange earnings on "non-traditional" exports (i.e., other than minerals, cocoa) are refunded to it in New Cedis.[76] Rebate amounts are within the Finance Minister's discretion.[77] Appropriate foreign exchange is any currency convertible "in fact or any currency of an African country."[78]

Increased Ghanaian financial incentives to expatriate businesses also were potentially offered in the Loans Act, 1970.[79] This Act, among other matters, enables the Ghanaian government, subject to National Assembly approval, to order the Bank of Ghana to guarantee loans and to undertake any other obligation necessary for a "prescribed body" to obtain financing from a third party.[80] A "prescribed body" includes a public, private, or joint public-private corporation whether expatriate or Ghanaian controlled,

[71]Industrial Development (Income Tax Relief) Act 1958, § 15.

[72]Section 5. Approval may be granted for:

"(a) the development of the productive capacity of the national economy through the efficient utilization of its resources and economic potential.

(b) the full utilization and expansion of the productive capacity of existing enterprises.

(c) The saving on imports, the increase of exports and the improvement of services which will assist the strengthening of payments position of the country; or

(d) A high level of employment and the impartation of technical skill to persons who are citizens of Ghana."

[73]*Id.*, §§ 10(1), 11.

[74]*Id.*, § 14. A seemingly important caveat to this incentive is that § 14(2) forbids such relief where it may tend to establish monopolies or create competitive advantages between similar projects. One might conclude that § 14(2) nullifies the use of § 14 since operation of § 14 necessarily would foster one or the other undesirable result.

[75]Act 357 (1971).

[76]*Id.*, § 1.

[77]*Id.*

[78]*Id.*

[79]Act 335 (1970).

[80]*Id.*, § 13.

and partnerships formed in Ghana. The 1970 Act improves upon the National Investment Bank Act 1963[81] which provided guarantees on bank loans only to enterprises in which the government had forty or more percent equity ownership.

*C. Exchange Control*

Ghana's and Nigeria's balance of payments difficulties motivate stringent exchange control policies concerning profit, capital, and salary repatriations. The governments generally publish such measures as informal central bank directives or instructions.

1. Nigeria

Nigeria's exchange control enabling legislation is the Exchange Control Act, 1962.[82] Regulations issued thereunder are implemented in Exchange Control Memoranda 1967 [E.C.M.] issued by the Nigerian Central Bank. Subsequent orders or directives "flesh out" these Memoranda.

All overseas remittances of capital, or profits, require Finance Ministry permission;[83] payments for imports require Central Bank permission.[84] Nigerian residents (corporate, noncorporate, individual) may not, without permission, maintain accounts in certain specified convertible "hard" currencies and must offer to sell such currency to an "authorized dealer" (*i.e.*, bank).[85] Foreign exchange transactions must be handled by authorized dealers and may require government approval.

During the Civil war, Nigeria, in effect, froze profits or capital repatriations and held up, for months or years, payments for imports—payments held "in the pipeline." Exchange Control Memorandum 19 (1967) allows certain profits and capital remittance hold-ups by requiring Finance Ministry permission to negotiate income or capital payments on Nigerian registered securities owned by foreign investors. After 1968 all expatriate companies operating in Nigeria must be incorporated in Nigeria;[86] therefore all such new companies consist of Nigerian registered securities.

In June 1971, the Federal Finance Ministry announced it would "consider" applications for transfer of up to 40 percent of all "transferable" profits and dividends outstanding as of 31 December 1970.[87] Transferable

[81]Act (1963) 163.

[82]No. 16 (1962).

[83]Exchange Control Memorandum 2 (1967).

[84]*Id.*

[85]E.C.M. (1967).

[86]The Companies Decree 1968 (No. 51) Part X, §§ 368 through 371.

[87]Chief Accountants Circular 1971, 2 N SBWA Ltd. Information obtained from interviews with exchange control personnel at Barclays Bank D.C.O. Ltd. (London) and Standard Bank of West Africa Ltd. (London). This information was promulgated in a Finance

profits and dividends presumably refer to those available for remittance after payment of taxes and obtaining the tax clearance certificate. If earnings previously held up were re-invested in the company via capitalization, the circular prohibits such profits being "decapitalized" and remitted. Memorandum 19 notwithstanding, at least 60 percent of past profits and dividends have remained held up while the Finance Ministry decides whether any of the remaining percentage may be remitted.[88]

The Exchange Control (Payments for Import) Order 1971 attempts to regularize prospective import payments. This directive is important for foreign investors because expatriate enterprises in Nigeria often are quite dependent upon imported raw materials. The Order stipulates that for post-1 April 1971 imports, (i) certain priority import items shall have foreign exchange made available for payment for such items 90 days from arrival date in Nigeria,[89] and (ii) all other import items shall have foreign exchange made available 180 days from the arrival date of the goods, except (iii) imports of capital goods worth over $70,000 for which foreign exchange is to be released on a pre-arranged longer-term payment schedule.[90] The Order, however, is silent concerning amounts owing on pre-1 April 1971 imports. There has been a liberalization of imports in recent months, reflecting lower tarriffs.

The Order also sets forth mimimum credit terms which should be obtained for imported plant and machinery valued at over £N25,000; and foreign exchange will be released for such capital investment obligations normally only in accordance with such minimim terms.[91]

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Ministry circular not in the form of an exchange control memorandum or regulation. "All Companies which have outstanding Profits and Dividends remittable to nonresident shareholders are invited to forward applications as and when due between now and 31st March 1972 to Exchange Control Department, Head Office, for onward transmission to the Federal Ministry of Finance. The Applications should be supported by the last audited Balance Sheet filed with the Registrar of Companies, Tax clearance certificates, and copies of the Boards resolution."

[88]Oral information, Mr. Stevens, Exchange Control Officer, Barclays Bank D.C.O. (London).

[89]Section 2 of the Order. Priority import items include (1) capital goods (2) mile (3) salt (4) cement (5) sugar, (6) drugs and pharmaceuticals (7) fertilizers and chemicals for agricultural purposes (8) essential raw materials for industries. Schedule I and Schedule II of the Order.

[90]*Id.*, § 2.

[91]These terms are:

(a) 5% payable against documents or signing of contract;
(b) 15% payable on delivery; and
(c) 80% payable over the following periods:

Machinery and plant valued at:

| | |
|---|---|
| (i) between £25,000 and £50,000 | Payable in no less than a period of 1 year. |
| (ii) between £50,000 and £100,000 | Payable in not less than a period of 2 years. |
| (iii) between £100,000 and £500,000 | Payable in not less than a period of 3 years. |

The Central Bank recently announced reduction, in effect, of expatriate individuals' remittance allowances. Under prior practice, total yearly remittance might equal 50 percent of the applicant's gross income up to £N5,000 income while at £N5,000 or above, the 50 percent was based on the applicant's net income. Moreover, the authorized dealer was empowered to approve the 50 percent remittance, thereby avoiding government approval in each individual case. Under revised Central Bank procedures,[92] the authorized dealer may approve yearly remittances of only 25 percent of gross annual income or £N3,000, whichever is lower; additional remittances must be approved by the Central Bank and evidently are available only for insurance, education, and medical expenses of the applicant's family.

2. Ghana

The Exchange Control Act, 1961[93] is Ghana's enabling legislation. The Act contains regulations, while subsequent Exchange Control Notices to Banks are issued by the Bank of Ghana.[94]

Generally, any movement of funds from Ghana is subject to exchange control.[95] Except in special circumstances, only authorized dealers (banks) may transact in foreign currencies.[96] Payments in excess of a set amount for imports require permission of the Bank of Ghana,[97] as do profits repatriations.[98] Applications for expatriate personal remittances by

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| | |
|---|---|
| (iv) between £500,000 and £1,000,000 | Payable in not less than a period of 5 years. |
| (v) over £1,000,000 | Payable in not less than a period of 7 years or other special terms as authorized by the Federal Ministry of Finance. |

Payments for imported capital equipment, machinery and plant valued at less than ₵25,000 will be made as if such commodities were imported under Schedule 1.

[92]Standard Bank of West Africa Ltd. circular: interview with Mr. Derek Cowie, Exchange Control Officer, S.B.W.A. Ltd. These individual remittance changes have not yet been promulgated by the Central Bank as an amendment to the Exchange Control regulation; these revisions, however, are being implemented.

[93]Act 71 (1961).

[94]These Notices are numbered BG/E.C. 7 to 25 and are dated 5 July 1961 to 28 February 1962. The Notices are periodically amended.

[95]Act 71 (1961), §§ 5-6, 9.

[96]*Id.*, § 1.

[97]BG/E.C. 10.

[98]BG/E.C. 25. Remittance of profits and dividends applications require submission of the following information:

*Profits:*

(a) Locally audited Balance Sheet, trading and profit and loss accounts for the relevant financial year.

(b) Letters from Income Tax Department confirming that tax and compulsory savings have been paid up-to-date, details of respective payments made for these items for the financial year of the company as in (a) above, and the amount of net profit recommended for transfer to the overseas Head Office.

non-West Africans, however, apparently need only be approved by authorised dealers.[99]

Ghana, like Nigeria, holds up profit, dividends and capital remittances. Some confusion seems to exist concerning remittances. From approximately 1962-63 to 1968, one source stated that no profits or dividends were remitted from Ghana except by three to four companies.[100] Government policy from 1968 allows profits and dividends repatriations, but only when foreign exchange is available. The result of this policy is that companies must "line up" for the required exchange as the Bank of Ghana, in its discretion, believes such exchange is available. Some companies are in a better bargaining position than are others with reference to obtaining exchange; that is, a company may be given preference in the "doling out" of exchange because it generates much foreign exchange earnings for Ghana (Ashanti Goldfields), but most expatriate enterprises usually are permitted to remit less than the total possible remittable amount.[101] Furthermore, a withholding tax of 25 percent is to be applied to remittance of profits and dividends earned in fiscal year 1972, as well as transfers of foreign exchange for business and private travel and for payment of commission, interest and headquarters expenses.

Personal remittances are available up to 50 percent of an individual's "basic salary." Overseas educational allowances are permitted.[102] Only in rare exceptions are additional sums allowed. A ten percent withholding tax is levied on personal remittances.

Ghana, in contradistinction to Nigeria, had met its imports payments through mid-1971.[103] However, most imports were subject to 90 or 180-day acceptance terms. There is a 90 or 180-day delay in Ghana of payment to the importer in Cedis; thereafter, these monies go into the "pipeline" and are paid in convertible currencies when such currencies become available.

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(c) Statement from the applicants where there has already been a transfer of profits for the same financial year.
(d) Bank Statement of applicants' current account for the preceding three months up-to-date, details of limit of overdraft or loan and respective balance up-to-date, in addition to current account statement.
(e) If applicants are exporters they must also provide their Bankers' certificate that they have no export proceeds for more than 60 days outstanding from the date of shipment.
*Remittance of Dividends:* As above (a) to (e) inclusive and
(f) A certified copy of the minutes of the Annual General Meeting declaring the dividend.
(g) Names and permanent residential addresses of non-resident shareholders and their shareholdings in the applicant company.

[99] BG/E.C. 12.

[100] Oral information, Mr. Orchard, Ashanti Goldfields Ltd., London.

[101] *Id.*

[102] B.G./E.C. 12.

[103] Oral information, Mr. Derek Cowie, *supra* note 92.

As in Nigeria,[104] in most instances, corporations registered in Ghana, but controlled by overseas interests, may borrow monies within Ghana only with government permission.[105] Moreover, Ghana requires that no such loans or overdrafts be granted unless the borrower agrees to retain total net profits in Ghana for the duration of the loan, a likely occurrence anyway in view of the aforementioned queuing for such exchange. Both nations require government approval, except for financing import and export goods, for overseas borrowings by Ghanaian or Nigerian residents, including firms.[106]

### *D. Company or Other Status Measures*

Numerous measures affecting regulation of banks and companies recently have been enacted in Nigeria and Ghana.

#### 1. Nigeria

Nigeria's new companies legislation, The Companies Decree 1968[107] (No. 51), introduced, in Part X, a significant change in Nigerian companies regulation by requiring that every enterprise in Nigeria owned by a company incorporated outside Nigeria must be incorporated in Nigeria as a separate entity from the foreign parent. Section 369 in Part X provides that when a foreign company had a place of business in Nigeria as of November 18, 1968, thereafter that place of business would be deemed incorporated under the Decree as a separate entity—a "reconstituted" company.[108] Section 370 stipulates that when a foreign company intends to establish a business in Nigeria, that company must seek incorporation for the prospective business.

The Companies Income Tax (Amendment) Decree 1971 (No. 10) provides for a loss carryover to the year of reconstitution for losses incurred prior thereto but not set-off against prior earnings. The object of Part X is to provide greater Nigerian government control over expatriate entities and to obviate the past expatriate practice of keeping outside Nigeria business

[104]*See* Exchange Control Memorandum 21 (1967). In Ghana the Bank of Ghana's permission is necessary whereas in Nigeria, the Finance Ministry's permission is required.

[105]*Id.*

[106]See B.G./E.C. 20 (Ghana); E.C. Memorandum 21 (1967) (Nigeria).

[107]The Decree replaced the Nigerian Companies Act, 1922 (CAP 37, Laws of Nigeria 1958).

[108]"Reconstitution" is so implemented that (i) the Registrar of shareholders remains unchanged and shares are considered held in the relative proportions as revealed by the foreign owner; and (ii) share cpaital of the reconstituted company is considered fully subscribed to the extent of an amount equalling net assets as revealed in the most recent company balance sheet delivered to the Nigerian registrar with reference to the companies Nigerian operations.

records of non-corporate entities operating in Nigeria.[109] By requiring incorporation in Nigeria, Part X makes the increased disclosure provisions of the 1968 Companies Decree applicable to such expatriate controlled companies. That Decree requires, for the first time, that corporate records be kept in Nigeria, that group accounts in specified form be prepared, that certain matters be set forth in the balance sheet and profit and loss account, and that all accounts be introduced at the annual general meeting.[110] A register of the company's shareholders must be kept in Nigeria, showing shares held. The nationality, names, and shareholdings of the Nigerian company's directors must also be kept.[111] As before, the Internal Affairs Minister's permission is required for expatriates to do business in any form in Nigeria.[112]

The Banking Decree, 1960 (No. 1) brings "Banks" operating in Nigeria within the ambit of the Companies Decree 1968 by requiring that all such "banks" be incorporated in Nigeria.[113] This Decree requires that a bank be licensed before it commences operations.[114] Furthermore, a bank may open or close branch offices in Nigeria only with the Central Bank's consent.[115] Banks "directly or indirectly controlled from abroad" must have paid up share capital of not less than £N750,000, whereas banks not so controlled must have paid up share capital of at least £N300,000.[116]

Each licensed bank must maintain a reserve fund in Nigeria and transfer yearly to it a percentage (12½–25 percent) of the net profits before dividends;[117] likewise, the Central Bank maintains powers to prescribe the minimum ratio between a licensed bank's paid-up capital and statutory reserves, on the one hand, and the bank's loans and advances on the other hand.[118] Indeed, a 1970 Central Bank directive stipulated that 35 percent

[109]The Companies Income Tax (Amendment) Decree 1970 (No. 19), amending § 30(9) of the C.I.T.A. 1961, provides that when foreign companies are reconstituted under Part X of the 1968 Companies Decree, capital allowances will not begin anew for the reconstituted company; that is, the reconstituted company will not be entitled to initial allowances for capital as if these were new assets of a new company.

[110]The Companies Decree 1968 (No. 51), §§ 140 - 151.

[111]*Id.*, § 108.

[112]§ 8(1) Immigration Act 1963, (Act 6).

[113]The Banking Decree 1969 (No. 1), § 1. The term bank is very broadly defined to include commercial banks, acceptance houses, discount houses, and "financial institutions," § 41. The Commonwealth Development Corporation is currently engaged in controversy with Nigerian authorities over whether the C.D.C. comes within the ambit of the 1969 Banking Decree and must therefore incorporate its Nigerian operations.

[114]Banking Decree, 1969, *supra* note 113, § 2. The Commissioner responsible for banking matters issues the license.

[115]*Id.*, § 4.

[116]*Id.*, § 6.

[117]*Id.*, § 9.

[118]Banking Amendment Decree 1970 (No. 3).

of each commercial bank's loans and advances outstanding must go to indigenous borrowers.[119] Limitations are placed on advances, loans, or credit to any one "person," thereby perhaps affecting transfers to the foreign parent bank.[120] Books of account, of course, must be kept in Nigeria,[121] and the Central Bank maintains complete discretion to examine a bank's books and general affairs.[122]

Inflation in Nigeria has prompted the Price Control Decree 1970, which establishes a Federal Price Control Board and provides for Price Control Committees in each state.[123] The Board's function, among other things, includes fixing prices[124] on "controlled commodities,"[125] while the Committee appoints inspectors to police implementation of the fixed prices. Whether this measure will control the post-civil war inflation is problematical. The Decree requires that fixed prices include a profit and be "fair,"[126] so that the measure hopefully should not greatly affect foreign private investors. Determination of a fair profit, however, is controlled by the Government.

2. Ghana

Unlike Nigeria, Ghana's Companies Code, 1963[127] does not require that foreign-controlled entities operating in Ghana be incorporated therein as a separate entity. Nor do disclosure provisions in the 1963 Companies Code seem as strenuous as the Nigerian counterpart. For example, Section 307 of the Companies Code seemingly allows the Registrar of Companies to excuse an external company from providing any books of account whatsoever on its Ghanaian operations.[128]

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[119] *Standard Bank, supra* note 1, at 5-6.

[120] Banking Decree 1969, *supra* note 113.

[121] *Id.*,§ 15.

[122] *Id.* §§ 20 *et seq.*

[123] Price Control Decree 1970 (No. 33), as amended by the Price Control (Amendment) Decree 1971 (No. 3).

[124] Section 4 empowers the Board to fix (i) a *basic price* for any "controlled commodity" and (ii) fix the *permitted variation* for that commodity in respect for that commodity in respect of any state (§ 4). The "controlled commodity" *basic price* is to be a "fair" controlled price, i.e., include cost of producing and manufacturer's profit where Nigerian goods are concerned, or duty paid landed cost plus importer's profit, where Nigerian goods are concerned, or duty paid landed cost plan importer's profit for imported goods (§ ). The "permitted variation will include transport and other distribution costs plus distributors profit for each state. (§ 4).

[125] "Controlled commodities," are selected by the Prices Control Board, and the selected items may vary. Presently controlled commodities include textiles and clothing, cement, roofing, sheets, pharmaceuticals, petrol diesel oil and fuel oil, motor vehicles and spare parts, building materials, tires and inner tubes.

[126] *Id.*, § 4.

[127] Act 179 (1963).

[128] *Id.*, § 307(5) reads: "Notwithstanding that the Registrar agrees to accept a profit and loss account, a balance sheet and group accounts under subsection (3) of this section, he may

Banks, however, must be incorporated in Ghana and numerous provisions provide for control by the Bank of Ghana over, and examination of, banking affairs. The Banking Act 1970[129] provides that banks must be licensed and that no foreign-controlled bank[130] be licensed unless it has a paid-up capital of ₵2,000,000 or 5 percent of the deposit liabilities, whichever is greater. Banks, by being incorporated in Ghana, are now subject to the strictures of the Companies Code, 1963.

Although Ghana does not require incorporation therein, the 1970 Banking Act and other licensing measures demonstrate Ghana's legislative attempts to obtain more control over the quantum and direction of foreign direct private investment. For example, the Business (Promotion) Act requires a manufacturer, regardless of size or owners nationality, to be licensed before that manufacturer may retail or wholesale goods manufactured by it in Ghana.[131]

Likewise, the Alien Enterprises Licensing Regulations, 1970[132] provide that expatriate-controlled manufacturing concerns situated in Ghana may open new trading outlets after August 1, 1970 only following licensing from the Minister responsible for Economic Planning; a license is to be issued on the basis whether such license will be detrimental to Ghanaian business. The Minister may rescind the license at any time when satisfied that such outlets become detrimental to Ghanaian business.[133] Nor may a foreign-controlled concern act as sales agent in Ghana for any overseas manufacturer without licensing from the Minister.[134]

The manufacturing Industries Act, 1970 stipulates that all manufacturing enterprises in Ghana be licensed and that future establishment of new manufacturing concerns or expansion of existing ones[135] be done only

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waive compliance with paragraphs (a), (b) and (c) of that subsection or any of such paragraphs if satisfied that compliance therewith is impractical having regard to the nature of the company's operations in Ghana."

[129]Act 339 (1970).

[130]Section 47 of the Banking Act defines a foreign bank as any bank or banking enterprise incorporated in Ghana in which 55 percent or more of the equity share capital is held by non-Ghanaians.

[131]Business (Promotion) Act, § 31 (2).

[132]L.I. 670

[133]*Id.*, § 9(2).

[134]*Id.*, § 1.

[135]Act 356 (1971). Expansion is defined as follows in § 12 of the 1971 Act: "12 (1) In this act unless the context otherwise requires 'expansion' means the installation of additional machinery and equipment designed: (a) to increase the production capacity of machinery and equipment installed before the coming into force of this Act, or (b) to add new products to existing lines of production, but does not include any expansion for enabling the production of raw materials or similar products used by the industry for manufacturing its basic products or any expansion for enabling the carrying out of further processing of its basic products."

under license issued by the Minister responsible for Trade and Industries. This Act gives the Ghanaian government direct control over whether expatriate or indigenous manufacturing concerns are established or expand, and in what ratio.

The Business (Promotion) Act provides that large ₵500,000+) retailing or wholesaling concerns in Ghana may continue to operate only if each non-Ghanaian owner or part-owner is licensed by the Minister responsible for Economic Planning (Finance Minister).[136] Licenses are valid for one year and must thereafter be renewed.

Ghana, like Nigeria, has price control measures. The Ghanaian Minister for Trade possesses the power to fix commodity prices under the Price Control Decree, 1972.[137] Investors should consult Maximum Price Orders issued thereunder for the fixed prices—the most recent being the Price Control (Maximum Prices) Order, 1969.[138]

## V. Conclusion

Recent investment legislation in Ghana and Nigeria displays those governments' generally similar approach to foreign private direct investment. This approach is common to developing nations. Dissimilarities between Ghana's and Nigeria's policies reflect differing contemporary economic conditions between those countries.

Both nations seek to gradually indigenize their economies; for example, Ghana has its Business (Promotion) scheme while Nigeria presages its indigenization desires in the 1970 -74 Development Plan. Emphasis upon "indigenization" avoids some international legal questions incident to strict nationalization schemes.

While one trend of recent legislation encompasses progressive indigenization, another trend, in Nigeria only, points toward progressive nationalization in strategic "growth" sectors. Legal questions incident to Nigeria's plans involve, among others, whether progressive government equity ownership without complete or even majority ownership constitutes nationalization per se, and if so, whether adequate timely compensation is provided. In this vein, one investment incentive for expatriates is Ghana's and Nigeria's acceptance of the arbitral role of the International Centre for Settlement of Investment Disputes.

Both Ghana and Nigeria seek increased control, in certain contrast to earlier years, over the direction of investment and the operations of ex-

[136]Business (Promotion) Act, § 17.
[137]N.R.C.D. 17 (1972).
[138]E.I. 135 (1969).

patriate concerns, even those not affected by indigenization or nationalization schemes. Recent legislation seeking increased control over expatriate operations includes: (1) measures requiring in-country incorporation such as the Nigerian Companies Decree, (1968) Part X, the Nigerian Banking Decree 1969, or the Ghanaian Banking Act 1970, (2) licensing provisions affecting enterprise establishment and expansion such as the Ghanaian Manufacturing Industries Act 1971, the Business (Promotion) Act's licensing regulations, or recent banking legislation in both countries, and (3) income tax provisions in both countries for tax assessment where assessable income reasonably is unascertainable.

Legislation attempting to affect the direction of investment include (1) numerous fiscal measures promoting general reinvestment and capitalization of profits,[139] or (2) measures providing fiscal incentives to specific types of investment such as Ghana's Excess Profits Tax (Amendment) Decree 1969, the Foreign Exchange (Export Bonus) Act 1971, and "approved projects" under the Capital Investments Act 1963, or new value-added criteria for pioneer status under the Nigerian Industrial Development (Income Tax Relief) Decree, 1971. Additionally, exchange control regulations in Ghana and Nigeria are utilized to affect the direction of foreign investment therein by granting favored repatriation status to certain enterprises or industries; on the other hand, unsettled and discriminatory exchange control practices ultimately discourage expatriate investment.

One significant characteristic of recent legislation, in general, is the broad discretion granted to such legislation to relevant Nigerian or Ghanaian administrative authorities concerning application of such legislation's incentives or regulations to expatriate enterprises. Most legislation allows administrative discretion to the point of possible arbitrary application. Other legislation such as the Nigerian Super Tax (Amendment) (No. 2) Decree 1971 provides for quantified criteria as to application and a very few legislative measures include procedures providing for appeals from administrative decisions, such as the Nigerian Price Control Decree 1970.

These legislative tendencies toward largely unreviewable (in practice) discretion vis-à-vis expatriate enterprises reveal the governments' desires to maintain flexibility of action. Yet in the context of these countries' bureaucracies, the wide ambit of discretion available permits opportunities

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[139]Legislation including tax breaks for reinvested earnings are Nigeria's 1967 Capital Gains Tax Decree, the 1971 Super Tax (Amendment) (No. 2) Decree, and Industrial Development (Income Tax Relief) Decree 1971. Ghana's legislation in the matter includes its 1971 Income Tax Regulations, 1968 Income Tax (Amendment) Decree, and capital allowances provisions.

for graft. Moreover, expatriate enterprises cannot know with exactitude their prospective status for any sufficient period of time commensurate with long-range business planning.

Recent legislation offers expatriate investors continued opportunities for fruitful heavy capital investment in Nigeria and, less so, in Ghana, while making clear Ghanaian and Nigerian desires to control more effectively their own industrial development. Political factors as evidenced by the Acheampong coup in early 1972, will undoubtedly continue to influence the vigor with which such legislation is implemented.